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10 VICENTE MANUEL AGUIRRE

11 UNITED STATES DISTRICT COURT
12 SOUTHERN DISTRICT OF CALIFORNIA

13 UNITED STATES OF AMERICA,) CASE NO. 08CR2428 JAH
14)
15 Plaintiff,)
16) NOTICE OF MOTION AND MOTION
17 v.) TO SUPPRESS EVIDENCE
18)
19 VICENTE MANUEL AGUIRRE,)
20)
21 Defendant.) DATE: August 25, 2008
22) TIME: 8:30 a.m.

23 TO: KAREN P. HEWITT, UNITED STATES ATTORNEY, AND CAROLINE P.
24 HAN, HER AUTHORIZED REPRESENTATIVE:

25 PLEASE TAKE NOTICE that on August 25, at 8:30 a.m., or as
26 soon thereafter as counsel may be heard, Defendant VICENTE
27 MANUEL AGUIRRE, by and through his counsel, Philip A. DeMassa,
28 of Philip A. DeMassa APC, will move the Court to enter an Order
suppressing evidence as set forth below in that Defendant was
arrested and his vehicle seized without probable cause or
warrant in violation of the Fourth Amendment and Federal Rules
of Criminal Procedure 12(b) and 41(c) and (f).

This motion will be based on the instant notice of
motion and motion, the attached statement of facts, the
memorandum of points and authorities, any and all evidence

1 produced at an evidentiary hearing, and any supplemental written
2 or oral arguments. Defendant requests an evidentiary hearing as
3 to all issues.

4 Defendant seeks to suppress: the currency found in his
5 vehicle (approximately \$274,000), all the items located in the
6 1999 Cadillac El Dorado including phones and documents, the
7 items seized from defendant's person, and any and all statements
8 obtained from defendant at any time, both pre and post arrest.

9 **I**

10 **STATEMENT OF FACTS**

11 [The following facts are mostly adduced from the
12 complaint and evidence provided by the Government to date.
13 Although one Government attorney said the stop of defendant's
14 vehicle going in the general direction of the United States-
15 Mexico border was based on a wiretap, the Government now refuses
16 to disclose whether a wiretap was involved in this case.
17 Rather, defendant was advised that if he wished to press this
18 point, he should file an applicable motion. For this reason,
19 although not having done so for some time, defendant filed on
20 August 13, 2008 a motion for discovery including seeking
21 revelation of all wiretap-related evidence. This motion
22 specifically excludes any motion to suppress based on wiretap
23 surveillance and related interceptions for the simple fact that
24 the Government has not admitted such-at this point in time.
25 When such evidence becomes available, a motion to traverse and
26 to suppress will be filed on this basis.]

27 On June 25, 2008 defendant's 1999 Cadillac El Dorado was
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1 stopped at 5:00 p.m. by a Customs Enforcement and Border
2 Protection Officer in the Calexico area. After receiving a
3 negative declaration from defendant, a canine allegedly alerted
4 on the vehicle's quarter panel. Defendant and the vehicle were
5 later searched and packages of currency were located concealed
6 behind the backseat backrest. A total of \$243,940 was seized.
7 Defendant was taken to an interview room and during an
8 interrogation made incriminatory statements admitting he had an
9 idea he was either transporting money or weapons.

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II

MEMORANDUM OF POINTS AND AUTHORITIES

A. Defendant Was Detained Without Cause And All Evidence
And Statements Derived Thereafter Must Be Suppressed.

Based on the paucity of facts provided in discovery, defendant was detained and questioned without any reasonable cause or "reasonable suspicion". Unreasonable stops, detentions and searches are presumptively unreasonable under the Fourth Amendment subject to a few specifically established and well-delineated exceptions. *Katz v. United States*, 389 U.S. 347, 357 (1967).

The Fourth Amendment applies to "seizures that involve only a brief detention short of traditional arrest." Whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. A person has a right to be free from arbitrary interference by law officers. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975). This situation occurred to this defendant.

The Supreme Court has made it clear that an "investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *United States v. Cortez*, 449 U.S. 411, 417 (1981). The detaining officers must have a "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Id.* at 418. Good faith on the part of the officers is legally insufficient. *Henry v. United States*, 361 U.S. 98, 101 (1959).

1 Here, the officer had no facts to justify stopping and
2 detaining defendant. It was early evening and defendant was
3 driving his vehicle legally within the United States. There is
4 not a scintilla of suspicious activity present in such a day-to-
5 day common action. Under any rational, objective view,
6 defendant was detained without reason. Any subjective view by
7 the officers is totally irrelevant. *Stansbury v. California*, 511
8 U.S. 318, 323, 326.

9 Defendants' case is similar to *Brown v. Texas*, 443 U.S.
10 47 (1979), where Chief Justice Burger found for a unanimous
11 court an unlawful detention while considering even more
12 egregious facts than are presented herein: two officers saw
13 Brown and another walking in opposite directions in an alley
14 whom the officers thought either had been together or were about
15 to meet. The officer felt Brown "looked suspicious", had not
16 been seen before, and was in an area with a "high incidence of
17 drug traffic." Brown refused to identify himself, was frisked
18 and arrested. Judge Burger found the detention occurred when
19 Brown was *first* approached and required to identify himself.
20 This was unlawful. Consistent with the cases cited above, Judge
21 Burger rejected the state's claim the officers had a
22 "reasonable, articulable suspicion that a crime had just been,
23 was being, or was about to be committed." "[N]one of the
24 circumstances preceding the officers' detention of appellant
25 justified a reasonable suspicion that he was involved in
26 criminal conduct." No facts were relied on by the officers to
27 show suspicious activity; being in a neighborhood frequented by
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1 drug users "is not a basis for concluding that appellant himself
2 was engaged in criminal conduct. In short, the appellant's
3 activity was no different from the activity of other pedestrians
4 in that neighborhood." *Id.*, 443 U.S. at 48-52. In the instant
5 case, no suspicious facts have been, or will be presented. The
6 things the officers observed defendants doing are those commonly
7 associated with simply driving.

8 Evidence seized by police via an unconstitutional search
9 and/or seizure is inadmissible in criminal proceedings and must
10 be suppressed. *Mapp v. Ohio*, 367 U.S. 643 (1961); *Wong Sun v.*
11 *United States*, 371 U.S. 471 (1963).

12 B. All Statements And Evidence Must Be Suppressed As Being
13 Obtained In Violation Of The Illegal Stop And
14 Detention.

15 *Miranda* warnings are triggered whenever a person is
16 questioned by law enforcement officers after being taken in
17 custody "or otherwise deprived of his freedom in any significant
18 way." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); *Stansbury*,
19 *supra*, 511 U.S. at 322. Defendant was deprived of his freedom
20 when he was accosted by the officer; hence, the officer was
21 under arrest triggering immediate *Miranda* warnings.

22 A *Miranda* violation accords a "bright line" legal
23 presumption of coercion requiring suppression of all unwarned
24 statements. *Oregon v. Elstad*, 470 U.S. 298, 306-07, n. 1, 317
25 (1985). Using an objective standard, defendant was being
26 detained. *Stansbury, supra*, 511 U.S. at 322, 324.

27 All statements defendants made thereafter, including
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1 the denials he was transporting currency in excess of \$10,000,
2 and the evidence which followed must be suppressed. *Dunaway v.*
3 *New York*, 442 U.S. 200, 216-219 (1979).

4 Even if *Miranda* rights were given at some point, there
5 can be no showing there was an effective and valid waiver. A
6 "heavy burden rests on the government to demonstrate the
7 defendant knowingly and intelligently waived his privilege
8 against self-incrimination...." *Miranda, supra*, 384 U.S. at 475.
9 Courts "must presume that a defendant did not waive his rights
10 [and] the prosecution's burden is great." *North Carolina v.*
11 *Butler*, 441 U.S. 369, 373 (1979). The discovery provided by the
12 government fails to either state or imply defendants ever waived
13 their rights.

14 C. The Warrantless Seizure And Search Of The Bags Was
15 Illegal.

16 The officers had control of the situation and the
17 vehicle. Defendant Aguirre was detained and not free to go. The
18 Cadillac was immobilized as the officers had the keys and
19 surrounded it. The officers were legally required to obtain a
20 search warrant. There was no emergency or exigent circumstance
21 justifying a search without a warrant. *United States v.*
22 *Chadwick*, 433 U.S. 1, 15-16 (1977). All the evidence must be
23 suppressed.

24 CONCLUSION

25 _____ For the reasons set forth above, defendant asks for an
26 evidentiary hearing and thereafter a Court order that the
27 evidence mentioned previously in this motion be suppressed.

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DATED: August 13, 2008

Respectfully submitted,

S/ Philip A. DeMassa
PHILIP A. DeMASSA
Attorney for Defendant
VICENTE MANUEL AGUIRRE

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3 UNITED STATES DISTRICT COURT
4 SOUTHERN DISTRICT OF CALIFORNIA

5 UNITED STATES OF AMERICA,) CASE NO. 08CR2428 JAH
6)
7 Plaintiff,) CERTIFICATE OF SERVICE
8 v.)
9 VICENTE MANUEL AGUIRRE,)
10 Defendant.)
11

12 I HEREBY CERTIFY THAT:

13 I, PHILIP A. DeMASSA, am a citizen of the United States and
14 am at least eighteen years of age. My business address is 2356
Moore Street, Suite 201, San Diego, CA 92110.

15 I am not a party to the above-entitled action. I have caused
16 service of Notice of Motion and Motion for Discovery, Disclosure
17 of Electronic Surveillance, etc. and Points and Authorities in
18 Support of Motion for Electronic Surveillance, etc and attached
Declaration of Philip A. DeMassa on the following parties by
electronically filing the foregoing with the Clerk of the
District Court using its ECF System which electronically
notifies them:

- 19 1. Caroline P. Han, Esq
20 Caroline.Han@usdoj.gov

21 I hereby certify that I have caused to be mailed the
22 foregoing by the United States Postal Service, to the following
non-ECF participant(s) in this case:

- 23 1. None

24 I declare under penalty of perjury under the laws of the
State of California that the foregoing is true and correct.

25 Executed on August 13, 2008

26 s/Philip A. DeMassa
27 PHILIP A. DeMASSA
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CERTIFICATE OF SERVICE